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No. 89-659

Supreme Court, U.S.
FILED
NOV 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

ELECTRO-TECH, INC., a
Michigan Corporation,
Petitioner,

vs.

H. F. CAMPBELL CO., a
Michigan Corporation,
Defendant,

and

CITY OF WESTLAND,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI FROM THE MICHIGAN SUPREME COURT

CUMMINGS, MCCLOREY, DAVIS & ACHO, P.C.
By: OWEN J. CUMMINGS
GAIL P. MASSAD
Counsel of Record
Business Address:
33900 Schoolcraft
Livonia, Michigan 48150-1392
(313) 261-2400
Attorneys for Respondent
City of Westland

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Michigan Supreme Court's Application of the Principles of *Williamson v. Hamilton Bank* was Clearly Erroneous When Petitioner Failed to Obtain a Final Decision From the Respondent; Therefore Petitioner's 42 U.S.C. Section 1983 Claim Was Not Ripe for Adjudication?

II.

Whether Under the Facts Presented Any Efforts by the Petitioner to Obtain a Final Decision Would Have Been Futile?

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Respondent, CITY OF WESTLAND, requests that this Honorable Court deny Petitioner's, ELECTRO-TECH, INC., request for a Writ of Certiorari to review the Order of the Michigan Supreme Court affirming the Michigan Court of Appeals' decision in this matter. The Michigan Supreme Court Order is dated August 1, 1989. Respondent received Petitioner's Petition for Writ of Certiorari on October 23, 1989.

ORDERS AND OPINIONS BELOW

In addition to the Orders and Opinions below listed in the Petitioner's Petition for Writ of Certiorari Petitioner's Appendices A-F the Respondent hereby includes:

Consent Judgment in the Wayne County Circuit Court, Detroit, Michigan, dated November 18, 1983; with respect to the condemnation proceedings between the instant parties hereto, awarding Petitioner the sum of $64,134.88, inclusive of costs, attorney fees and interest, through October 13, 1979.

JURISDICTION

This case involves an action by the Petitioner brought under 42 U.S.C. 1983 asserting a violation of the Petitioner's due process rights as a result of the Respondents' refusal to approve a site plan and ultimately issue a building permit; which Petitioner claims was an unlawful taking of property without just compensation in violation of the Fifth and Fourteenth Amendments. The matter proceeded to trial before a jury, in the Wayne County Circuit Court under 42 U.S.C. Section 1983 on a theory of "regulatory taking"; which resulted in a jury verdict in the sum of $433,052.00 in favor of the Petitioner against the Respondent. A Judgment was entered in favor of the Petitioner against the Respondent in the amount of $626,659.07 as a result of said verdict.

The Michigan Court of Appeals reversed the Judgment entered in favor of the Petitioner as a result of the jury verdict on the basis that even if Respondents' decision to deny a building permit was erroneous; said decision was not a violation of Petitioner's state or federal constitutional rights, under 42 U.S.C. Section 1983; due to the fact Petitioner should seek redress for same as provided for by the State of Michigan.

The Michigan Supreme Court affirmed the Michigan Court of Appeals. The Michigan Supreme Court held Petitioner's claim of "taking" need not be reached when said claim was not ripe for adjudication as Petitioner failed to receive a final decision from the Respondent. In reaching its decision, the Michigan Supreme Court reviewed the facts of the instant matter; and applied the decision and reasoning set forth in *Williamson County Regional Planning Commission, et al. v. Hamilton Bank of Johnson City*, 473 U.S. 172; 105 S.Ct. 3108; 87 L.Ed.2d 126 (1985).

Although a federal question was presented in the case at hand, the Michigan Supreme Court correctly applied the requirements set forth in *Williamson* and other similar cases. Petitioner proceeded in this matter at the trial court level on a theory of a denial of procedural due process; claiming the Respondent had "taken" Petitioner's property without just compensation. Petitioner contended for the first time before the Michigan Supreme Court that the actions of the Respondent herein amounted to a deprivation of the Petitioner's substantive due process rights. In any event, the Michigan Supreme Court's decision in this matter is not clearly erroneous, nor contrary to law. The Michigan Supreme Court's decision has not decided this matter in conflict with *any* decisions applicable to the issues presented herein. Exercising its sound judicial discretion; this Honorable Court should

deny the Petitioner's Petition for Writ of Certiorari as same does not warrant review. U.S. Sup. Ct. Rule 17(b). Respondent respectfully requests that this Honorable Court deny Petitioner's Petition for Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

Plaintiff-Petitioner, ELECTRO-TECH, INC., owns and operates an industrial facility in the City of Westland, Michigan. ELECTRO-TECH, INC., is a contractor to the United States Military, manufacturing components for tanks and other armaments. ELECTRO-TECH, INC.'s business with the Government is on a contract basis, those contracts being let on a competitive bid.

On October 26, 1978, ELECTRO-TECH, INC. contracted with Defendant, H. F. CAMPBELL COMPANY, to construct an addition to its manufacturing facilities located at 1313 Newburgh Road, Westland, Michigan. Pursuant to the agreement between the Petitioner and CAMPBELL, that addition was to be completed by February 13, 1979. However, contrary to that agreement, CAMPBELL did not even make application to the Respondent, CITY OF WESTLAND, for site plan approval on this project until late February, 1979, *after* the stated completion date of the contract. Further, CAMPBELL did not submit site plans to ELECTRO-TECH, INC., until March, 1979.

The site plans were reviewed by various City Departments having jurisdiction to make recommendations for approval by the City Planning Commission. The City Planning Commission would make a recommendation; which would be sent to the City Council.

On February 21, 1979, the City Planning Commission notified Mr. Wagner, of Defendant, H. F. CAMPBELL, CO., that site plan approval request for the addition to ELECTRO-TECH, INC.'s building required 13 items

before the plan would be submitted to the Planning Commission and City Council. The site plan was scheduled for review before Respondent's, CITY OF WESTLAND, City Council several times; but was postponed to permit the Petitioner's President, Mr. Jack Beauchamp, to attend.

After several other adjournments to permit the Petitioner to attend, the Petitioner's site plan was scheduled for review on June 11, 1979. With Mr. Jack Beauchamp in attendance, the City Council resolved to tentatively approve the site plans, subject to five stated contingencies. On June 15, 1979, Beauchamp, as President of ELECTRO-TECH, INC., received a letter setting forth the resolution of the City Council, containing the five contingencies, adopted on June 11, 1979. Specifically, the letter stated in pertinent part as follows:

> At the special meeting of the Westland City Council on June 11, 1979, the following resolution was adopted:
>
> > RESOLVED that the Council concur with the recommendations of the Planning Commission and approve the request of Mr. Richard Wagner (H. F. Campbell Company for Electro-Tech, Inc.), for site plan approval for an addition to an electrical manufacturing building Parcels 20K2da, 20K2d2b, east side of Newburgh (south of C & O RR, 1313 Newburgh), W. 20, contingent upon the following:
> >
> > 1. Loading area should be clearly designated as such by striping and signage.
> > 2. A second access door in the new addition is required along the north side of the building for fire protection.
> > 3. Fire and Engineering requirements must be met on final engineering and building plans.

4. Dedication of 27 feet wide, approximately 210 feet in front of K2da for future Newburgh Road right-of-way.
5. The front greenbelt area is to be grated and sodded.

The contingency requesting the dedication of 27 feet of road right-of-way, along Newburgh Road, was made pursuant to the recommendation of the Planning Commission. The Planning Commission made this request in compliance with a general plan to widen Newburgh Road. At the June 11, 1979 hearing, Mr. Beauchamp told the City Council he would not dedicate the property as requested.

Thereafter, CAMPBELL made some revisions to the site plan to comply with the request of the City Council. However, the evidence at trial established CAMPBELL *never* submitted a final set of site plans for approval; in order to approve the site plan and/or receive building permits for the proposed addition. As late as September, 1979, CAMPBELL was *still* revising plans for the addition. The City Council never rejected Petitioner's site plans.

In the meantime, ELECTRO-TECH, INC. took no action by way of an appeal of the City Council's decision or other action in state court (such as mandamus, injunction, etc.), to obtain relief. Thereafter, by letter dated October 15, 1979, the Respondent indicated it wanted to purchase the requested property. When the parties could not agree as to the proper compensation amount for the property; Respondent, CITY OF WESTLAND, filed a condemnation action in the Wayne County Circuit Court, located in Detroit, Michigan, to take that property. The condemnation action was resolved by a Consent Judgment, awarding the Petitioner the sum of $64,134.88, inclusive of costs, attorney fees and interest, through October 13, 1979. The

Consent Judgment was entered into by the parties on October 31, 1983. Said Consent Judgment was set forth in writing on November 18, 1983.

Petitioner first filed an action against the Respondent on May 28, 1982, nearly three years after the alleged wrongful action of the CITY OF WESTLAND's City Council. The Respondent was added as a party Defendant in the lawsuit; which Petitioner had begun against its contractor, H. F. CAMPBELL COMPANY. After several amendments Petitioner's Complaint alleged causes of action against the CITY OF WESTLAND based on state law and 42 U.S.C. Section 1983. At a pre-trial Motion, the Wayne County Circuit Court ruled that the Petitioner's state law *tort* claims were barred by state law governmental immunity. As a result, the case proceeded to a trial before a jury on Petitioner's 42 U.S.C. Section 1983 claim. The trial resulted in a verdict of $433,052.00 in favor of the Petitioner against the Respondent. A Judgment was entered for that amount together with accrued interest thereon to June 1, 1985, for a total Judgment in the amount of $626,659.07.

The Respondent filed a timely appeal of this decision, before the Michigan Court of Appeals. Respondent raised four issues seeking a reversal of the jury verdict.

On July 20, 1987, the Michigan Court of Appeals, in a published Opinion, held no violation of due process or any other constitutional right occurred, under 42 U.S.C. Section 1983, when a local governmental board denies a building permit or made demands exceeding its authority. Petitioner must seek review of that within the State Courts. The Michigan Court of Appeals did not address the other three issues raised by the Respondent in its Brief on Appeal; stating their response to the Section 1983 issue was dispositive of the case. *Electro-Tech, Inc. v. Camp-*

bell, 161 Mich. App. 622; 411 N.W.2d 800 (1987). (Petitioner's Appendix, D). The Petitioner filed a Motion for Rehearing at the Michigan Court of Appeals, which was denied on September 28, 1987.

The Petitioner requested a rehearing of the matter before the Michigan Court of Appeals contending the Court of Appeals should reconsider the appeal in light of the decision set forth in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304; 107 S.Ct. 2378; 96 L.Ed.2d 250 (1987). To support its Petition for Rehearing, Petitioner provided a Supplemental Brief, citing another recent Supreme Court case, *Nollan v. California Costal Commission*, 483 U.S. 825; 107 S.Ct. 3141; 97 L.Ed.2d 677 (1987).

On October 13, 1987, Petitioner filed an Application for Leave to Appeal and a Motion for Immediate Consideration with the Michigan Supreme Court. By an order of the Michigan Supreme Court, dated March 22, 1988, the Motion for Immediate Consideration was granted, and the Application for Leave to Appeal was granted limited to the issue of whether the Petitioner's Judgment under 42 U.S.C. Section 1983 should be reinstated. Again Respondent requested the Michigan Supreme Court to consider the additional issues raised before the Michigan Court of Appeals; however, the Supreme Court declined as said issues were not decided by the Michigan Court of Appeals.

After entertaining oral arguments on the matter, as well as requesting additional information, the Michigan Supreme Court issued a lengthy Opinion dated August 1, 1989. The well-reasoned Opinion of the Michigan Supreme Court held Petitioner's claim under 42 U.S.C. Section 1983 was not ripe for adjudication; based on *Williamson, supra*. The Petitioner failed to receive a final decision from the Respondent herein.

With respect to the Petitioner's "regulatory taking" claim, the Michigan Supreme Court held the Petitioner's 42 U.S.C. Section 1983 claim was not ripe for adjudication; when the Petitioner failed to obtain a final decision. Therefore the Court was unable to determine to what extent, if any, the Respondent had interfered with the Petitioner's "investment-backed expectations". Finally, the Court held the Petitioner failed to establish futility as an exception to the final decision requirement set forth in *Williamson.*

SUMMARY OF ARGUMENT

The Michigan Supreme Court's application of the holding set forth in *Williamson* and other similar cases is not clearly erroneous; nor contrary to law. Further, the Petitioner did not proceed at the trial court level, nor at the Michigan Court of Appeals level, on a theory that the Respondent had violated the Petitioner's substantive due process rights. In any event, Petitioner has not met the ripeness requirements set forth in *Williamson* and other similar cases; for bringing a 42 U.S.C. Section 1983 action. Before a landowner can be said to have been denied Fifth Amendment "just compensation" for an action under 42 U.S.C. Section 1983; said landowner must be denied just compensation at the state court level first. Efforts to obtain a final decision from the Respondent would not have been futile. The City Council never rejected the Petitioner's site plans.

ARGUMENTS

I.

The Michigan Supreme Court's Application of the Principles of Williamson v. Hamilton Bank Was Not Clearly Erroneous When Petitioner's Claim Under 42 U.S.C. Section 1983 Was Not Ripe for Adjudiction; When It Failed to Obtain a Final Decision From the Respondent.

In *Parratt v. Taylor,* 451 U.S. 527; 101 S.Ct. 1908; 68 L.Ed.2d 420 (1981), this Honorable Court set forth the necessary elements for maintaining a cause of action under 42 U.S.C. Section 1983 for deprivation of property without due process. In finding that the plaintiff had not stated or proven a cause of action under 42 U.S.C. Section 1983, the Court stated:

> Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivation satisfies the requirements of procedural due process.
>
> * * *
>
> Although state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under Section 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold they are sufficient to satisfy the requirements of due process. 101 S.Ct. at 1914, 1917.

The principle of *Parratt* was extended in *Hudson v. Palmer,* 468 U.S. 517; 104 S.Ct. 3194; 82 L.Ed.2d 393 (1984). In *Hudson,* plaintiff alleged deprivation of his pro-

perty by the prison officials' intentional destruction of his personal property during a search of his cell. Holding that plaintiff failed to state a claim under Section 1983; the Court stated:

> . . . We hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the due process clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for loss is available. 82 L.Ed.2d at 407.

The principles of *Parratt* and *Hudson* have been applied to cases similar to the instant case. In *Corder v. City of Sherwood*, 579 F.Supp. 1042 (E.D. Ark. 1984), plaintiff sued the city under 42 U.S.C. Section 1983 alleging the defendant city's refusal to issue building permits resulted in a violation of plaintiff's constitutional rights under the Fourteenth Amendment. In finding that the plaintiff had failed to state a claim under Section 1983, the Court stated:

> . . . Under Arkansas law, the Chancery Courts have the power to review zoning decisions and grant relief when a zoning decision is arbitrary, capricious, or unreasonable. An appeal from an adverse decision could be pursued through the Arkansas state court system. Therefore, the plaintiff's right to judicial review of a city council's decision by state courts afforded them protection from arbitrary, capricious or unreasonable action and therefore affords them due process, as well as equal protection. 579 F.Supp. at 1044.

Likewise in *Collier v. City of Springdale*, 733 F.2d 1311 (8th Cir. 1984), plaintiff alleged the defendant city took his property without due process or compensation by negligently flooding his trout farm, killing some of the fish thereon. The Court, in a lengthy discussion applying the *Parratt* decision, found plaintiff had failed to plead and prove

a claim under Section 1983. The state provided adequate remedies to compensate the plaintiff for his loss. The adequate remedy was specifically, a condemnation action in state court which provided compensation to the plaintiff for the taking of his property.

In *Chiplen Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983), a real estate developer brought suit against the defendant city under 42 U.S.C. Section 1983 alleging a violation of constitutional rights. In a case not unlike the instant case, defendant city denied the plaintiff a building permit, and only issued the building permit some five years after the original application and after plaintiff had been to the Supreme Court of New Hampshire. The gravamen of plaintiff's complaint was that the defendant denied the plaintiff due process by maliciously denying plaintiff a building permit for invalid and illegal reasons, and in bad faith. In holding the plaintiff had failed to plead or prove a claim under Section 1983, the Court stated:

> A mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct the error. 712 F.2d at 1528.

In *Williamson, supra;* a property owner filed suit against a planning commission, when its proposed development of certain plats of property had been denied by the commission. The property owner's suit was based on 42 U.S.C. 1983 alleging that the commission had taken its property without just compensation by refusing to approve the proposed development. This Honorable Court held that the landowner's claim was premature and not ripe for review when the landowner had failed to obtain a final decision on its development proposal. In so holding, the Court specifically stated:

> Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance

> and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe.

This Honorable Court further stated:

> Similarly, if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the just compensation clause until it has used the procedure and been denied just compensation.
>
> The recognition that a property owner has not suffered a violation of the just compensation clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the state for obtaining just compensation is analogous to the Court's holding in *Parratt v. Taylor*, 451 U.S. 527 (1981).
>
> * * *
>
> Thus, the state's action is not "complete" in the sense of causing a constitutional injury "unless or until the state fails to provide an adequate post-deprivation remedy for the property loss." *Hudson v. Taylor*, ____ U.S. ____, ____ n.12 (1984). Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the state's action here is not "complete" until the state fails to provide adequate compensation for the taking.
>
> * * *
>
> Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.

Thus, *Williamson, supra*, clearly holds before a plaintiff may bring a cause of action under 42 U.S.C. 1983, the plaintiff must be deprived of its constitutional rights by a

final decision of the local governmental body; *and* the plaintiff must utilize state court remedies and be denied relief before a plaintiff may initiate a 42 U.S.C. 1983 action.

The decision set forth in *Williamson, supra*; was reaffirmed by this Honorable Court in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340; 106 S.Ct. 2561; 91 L.Ed.2d 285 (1986), reh. den. 478 U.S. 1035; 107 S.Ct. 22; 92 L.Ed.2d 773 (1986).

In *MacDonald*, this Honorable Court was presented with the question whether a rejection of a subdivision proposal deprived the appellant of its property without just compensation contrary to the Fifth and Fourteenth Amendments to the United States Constitution. In determining that issue, this Court stated:

> Because of the importance of the question whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings, we noted probable jurisdiction. (Citation omitted). On further consideration of our jurisdiction to hear this appeal, aided by briefing and oral argument, we find ourselves unable to address the merits of this question.

In reaching that conclusion, this Honorable Court stated:

> The regulatory taking claim advanced by appellant has two components. First, appellant must establish that the regulation has in substance "taken" his property (footnote omitted)—that is, that the regulation "goes too far." (Citations omitted). Second, appellant must demonstrate that any proffered compensation is not "just."
>
> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property.

* * *

> . . . Our cases have accordingly "examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action—that have particular significance." . . . Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land retains any reasonable beneficial use or whether existing expectation interest has been destroyed." *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 190 n.11 (1985). . . . That affect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. *Id.* at 199-200.
>
> . . . a court cannot determine whether a municipality has failed to provide "just compensation" until it knows what, if any, compensation the responsible administrative body intends to provide. See *id.*, at 195 ("the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking" (footnote omitted)). The local agencies charged with administering regulations governing property development are singularly flexible institutions: what they take with the one hand they may give back with the other.

Thus, this Honorable Court has consistently held that before a cause of action under 42 U.S.C. Section 1983, (based on an alleged taking of property as a result of a municipality's regulations regarding the landowner's use of same); said landowner must obtain a final decision from the municipality charged with administering said regulations and be denied relief in the state court.

In the case at hand, the City Council tentatively approved the site plans, subject to complying with five contingencies. Four of which were legally valid. However, the following facts cannot be emphasized enough, as justification for upholding the decision of the Michigan Supreme Court; when in fact Plaintiff never received a final decision from the Respondent herein.

Petitioner never submitted a final site plan, containing plans which complied with the four valid contingencies set by the City Council. Petitioner's contractor, CAMPBELL, was past the building completion date by the time CAMPBELL submitted *the first site plans* to the Planning Commission, for its recommendation to the City Council, in February, 1979. Evidence produced at trial clearly established that the completion of said addition was to be done by February 21, 1979.

Petitioner, through its President, Mr. Beauchamp, delayed his appearance before the City Council for four months, past the completion date of the addition, before appearing on June 11, 1979. Thus, the delay in considering the site plan submitted by CAMPBELL on behalf of the Petitioner was not caused by the City Council. The delay in constructing the addition was not the fault of the Respondent.

As late as September, 1979, CAMPBELL was still revising the site plans. In the meantime, Petitioner took *no* action by way of appeal or other state court relief available to it, under state law, to remedy what it believed was an "illegal demand."

On October 15, 1979, three months after its contingency approval, the City Council, rescinded the dedication contingency when it offered to purchase the property. When the parties were unable to reach an agreement short of litigation, i.e. condemnation proceedings initiated by the Respondent, the matter was resolved ultimately by entry

of a Consent Judgment. Yet, Petitioner *never* submitted any further site plans to the City Council to complete the addition to his building. In essence, Petitioner sat on its rights, ran up its damages and filed suit alleging, inter alia, a violation of 42 U.S.C. Section 1983; claiming a regulatory taking occurred from an "illegal" condition placed on the granting of site plan approval, contrary to the Fifth and Fourteenth Amendments.

Here, as in *McDonald, supra*, Petitioner submitted one site plan to the Respondent's decision making entity, i.e. the City Council and received one response thereto; a tentative approval. Four months after the completion date, set by the Petitioner with his building contractor, Plaintiff appears before the City Council and learns of the site plan approval subject to five contingencies. Three months later, in September, 1979, Petitioner's building contractor was still revising the site plans. Thus, it is clear under the facts presented the Petitioner *never* received a final decision from the Respondent herein; thereby precluding Petitioner's 42 U.S.C. Section 1983 claim, under *any* theory, when same was not ripe for adjudication.

In *Kinzli v. City of Santa Cruez*, 818 F.2d 1449 (9th Cir. 1987); plaintiffs filed suit alleging a taking claim based on the Fifth and Fourteenth Amendments without just compensation, a denial of equal protection, as well as a substantive due process claim; as a result of restrictions placed on the use of their property by the defendant city. The Ninth Circuit Court of Appeals held plaintiff's claims were not ripe for adjudication with respect to *all theories* of all liability advanced by the plaintiffs. In so holding, the Ninth Circuit based its decision on the holdings set forth in *Williamson, supra; MacDonald, supra;* and *First English Evangelical, supra.* With respect to each claim contended by the plaintiffs in *Kinzli*, the Ninth Circuit held that before same would be ripe for adjudication the plaintiff must receive a final decision from the defendant. This was

true, even in the face of allegations by the Plaintiff that state procedures were inadequate; and, any attempt to obtain a final decision from the municipal defendant would be futile. In so holding, the Court stated:

> *The ripeness requirement of first seeking additional compensation from the City is excused only if the State does not have an available and adequate inverse condemnation procedure. Hamilton Bank,* 105 S.Ct. at 3122. The Kinzlis contend that California does not have an available and adequate procedure for obtaining compensation for inverse condemnation. We disagree. (Emphasis added).

The above-quoted statement was based on the Court's determination that California, in fact had two available procedures in which the plaintiffs could seek just compensation. Number one, plaintiffs could file another inverse condemnation action, for the actions taken by the city subsequent to a 1970 condemnation judgment entered in a prior matter between the parties. Further, the Court found California provided an adequate procedure since the state court could award money damages for those of the plaintiff's claims which were ripe. Plaintiffs could institute a cause of action based on misrepresentation when the city represented to plaintiffs that it was going to build a road through the plaintiffs' property for over ten years and later abandoned its project. Therefore, Petitioners could seek money damages under state law.

Unlike many of the cases coming from California, where California specifically does not provide for the awarding of money damages in inverse condemnation proceedings; the State of Michigan specifically provides for a cause of action under inverse condemnation. Further, both the Michigan Constitution and state statutory law provide plaintiff with adequate remedies to seek full redress of any damages alleged to have occurred as a result

of the Respondent's actions herein. Michigan case law, has specifically held that damages may be awarded for temporary takings of property by state entities. *Poirier v. Grand Blanc Twp.*, 167 Mich. App. 770; 423 N.W.2d 351 (1988); lv. den. 431 Mich. 911 (1988).

The Michigan Constitution, 1963, Article 10, Section 2, provides: "private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." Further, Michigan statutory law found at M.C.L.A. 213.51-213.77; M.S.A. 8.265(1)-8.265(27), commonly known as the Uniform Condemnation Procedures Act, provides for a Plaintiff to seek damages based on a "constructive taking" or "de facto taking".

Case law interpreting said statute and constitutional provisions has defined "just compensation" as an amount of money which would put the person whose property had been taken in as good a position as the person would have been if the taking had not occurred. *Matter of Acquisition of Land for Central Industrial Park No. 755 v. Chap Automobile Distributors, Inc.*, 142 Mich. App. 675; 370 N.W.2d 675 (1985); *Matter of Acquisition of Land for Central Industrial Park Project v. Goodwill Community Chapel Church*, 127 Mich. App. 255; 338 N.W.2d 204 (1983); *In Re Urban Mass Transportation Facilities Project Michigan - UTG - 4*, 28 Mich. 529; 184 N.W.2d 563 (1970); *Petition of Makie*, 362 Mich. 697; 108 N.W.2d 755 (1961); *Fitzsimmons & Galvin v. Rogers*, 243 Mich. 649; 220 N.W. 881 (1928).

Further, in *Matter of Acquisition of Land for Central Industrial Park Project, supra*, the Michigan Court of Appeals stated:

> Accordingly, if a city names a property owner as a defendant in an action for condemnation, the lower

> court in which the condemnation action is filed is the jurisdictionally proper form in which to test the validity of the city's "good faith" offer *and* determine whether the city took coercive action in acquiring the property. *Id.*, 338 N.W.2d at 206.

Thus, it is clear Petitioner had adequate remedies under state law to provide it with "just compensation" pursuant Michigan constitutional provisions, as well as statutory law.

Under Michigan's Constitution and statutory provisions, the state courts have the power to determine if the governmental entity's actions are abusive and award "just compensation," for such abuse. ELECTRO-TECH had adequate remedies at state law to receive *full compensation* for the taking of its property in the condemnation proceedings. Condemnation proceedings were in fact in stituted with a consent judgment settling all claims of damages arising from the taking of its property. Petitioner received due process, both procedural and substantive, when just compensation was paid by the Respondent as a result of the condemnation proceedings instituted previous to Petitioner's 42 U.S.C. Section 1983 action.

As stated in *MacDonald, supra* and *Kinzlis, supra;* Petitioner herein has failed to meet the two prerequisites for filing a cause of aetion under 42 U.S.C. Section 1983.

Quoting *MacDonald,* the *Kinzlis* Opinion stated:

> Recently, in *MacDonald,* the Supreme Court explained that to assert a regulatory takings claim, a plaintiff must establish its two components: (1) that the regulation has gone so far that it has "taken" plaintiff's property, and (2) that any compensation tendered is not "just." *MacDonald,* 106 S.Ct. at 2566.
>
> To establish this first component of a regulatory takings claim, "an essential prerequisite" must be present:

> there must be a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A Court cannot determine whether a regulation has "gone too far" unless it knows how far the regulation goes.

The decisions set forth in *Williamson*, *MacDonald*, and *Kinzli*, were reaffirmed in *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1988); and *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988).

In fact, *Shelter Creek Development*, *supra*, after reviewing the holding set forth in *Williamson*, *MacDonald*, *Kinzlis* and *Herrington*, specifically stated:

> We also left no doubt that equal protection claims *and substantive due process claims are to be analyzed for ripeness in the same way that regulatory taking claims are analyzed:* "[T]he [landowners'] equal protection claim is not ripe for consideration by the district court "until planning authorities and state review entities make a final decision on the statute of the property." The [landowners'] equal protection claim therefore is not ripe, just as their taking claim is not ripe. *Id.* at 1455-56 (quoting *Norco Construction, Inc. v King County*, 801 F.2d 1143, 1145 (9th Cir. 1986)). *Likewise, the landowners' due process claim was not ripe because they had failed to "obtain final decisions regarding the application* of the regulations to their property and the availability of variances." *Id.* at 1456; accord *Herrington v. County of Sonoma*, 834 F.2d 1488, 1496 (9th Cir. 1987) (2-1) (Emphasis added).

Thus, it is clear Petitioner's 42 U.S.C. Section 1983 action was not ripe for adjudication. The Michigan Supreme Court did not misapply the *Williamson* holding or other federal case law to the matters at hand. The Michigan Supreme Court's decision does not warrant review by this

Honorable Court. Petitioner's Petition for Writ of Certiorari should be denied by this Honorable Court.

Lastly, Petitioner has argued here; as it attempted to do for the first time on appeal before the Michigan Supreme Court, that it brought a substantive due process violation under 42 U.S.C. Section 1983; therefore *Williamson* does not apply. Petitioner's contention is meritless.

Petitioner has relied upon several cases in support of its position that the finality requirement set forth in *Williamson* is not applicable to substantive due process claims as a basis for a cause of action under 42 U.S.C. Section 1983. Those cases are: *Bello v. Walker,* 840 F.2d 1124 (3rd Cir. 1988); *Bateson v. Geisse,* 857 F.2d 1300 (9th Cir. 1988); *Hoehne v. County of San Benito,* 870 F.2d 529 (9th Cir. 1989); *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir. 1983); *Parks v. Watson,* 716 F.2d 646 (9th Cir. 1983); *Littlefield v. City of Afton,* 785 F.2d 596 (8th Cir. 1986); and *Nollan v. California Costal Comm'n,* 483 U.S. 825; 107 S.Ct. 3141; 97 L.Ed.2d 677 (1987). All of the aforementioned cases relied upon by the Petitioner are factually and legally distinguishable from the matters at hand. Further, previously cited case law herein establishes Petitioner's contention is meritless.

In *Bello, supra,* plaintiff landowners, received final approval of their site plans and were denied the issuance of a building permit. The landowners attempted to file a cause of action in the state court and attempted to pursue its state court remedies, *prior to filing* their 42 U.S.C. Section 1983 action. In reviewing the District Court's grant of summary judgment in favor of the defendants, with respect to the landowner's substantive due process claims, the question of finality was not a matter at issue before the Court.

In *Bateson, supra,* a property owner brought a Section 1983 action against a city, and city council members; when

same refused to issue the property owner a building permit. However, under California law; once the property owner had satisfied all conditions for the issuance of a building permit, said property owner was entitled to said permit. City regulations specifically provided that city officials must issue a building permit to an applicant who had satisfied all the requirements for same. In the instant matter, the Petitioner *never satisfied* all of the requirements for the approval of his site plan; let alone the issuance of a building permit. Further, in *Bateson* the city council, after refusing to issue the plaintiff a building permit, initiated a zone change on *Bateson*'s property. The issue of finality was never a question for the Court's decision in *Bateson*.

Clearly, under the holding set forth in *Hoehne, supra*, it is clear that the finality requirement set forth in *Williamson, supra*; must be satisfied by any landowner alleging a taking of property as a basis for a 42 U.S.C. Section 1983 violation; whether same is grounded on procedural due process, substantive due process, "taking" and/or equal protection arguments. The bottom line in all of these cases, aside from requiring a final decision, also requires that the state remedies available are inadequate. Once again, it must be reiterated that this Honorable Court has continuously stated that "if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson*, 473 U.S. at 195, 105 S.Ct. at 3121.

In *Hoehne, supra*; the Circuit Court specifically found that California did not provide the landowner adequate remedies for just compensation of property that was taken by the governmental entity.

The ripeness requirements set forth in *Williamson* and reaffirmed and adopted in *MacDonald* are stringent. In

order to have a 42 U.S.C. Section 1983 claim ripe for adjudication, based on a regulatory taking of property, a landowner must (a) receive a final decision and (b) be denied just compensation for same. Petitioner in the instant case has failed to establish that a final decision was in fact reached. Petitioner did receive just compensation as a result of the state condemnation proceedings, and the state court remedies were not inadequate.

II.

Petitioner's Failure to Obtain a Final Decision, Under the Facts Presented, Can Not Be Excused by the Futility Exception to the Holding Set Forth in Williamson.

A futility exception to the final decision ripeness requirement set forth in *Williamson, supra; MacDonald, supra*; and other cases has been developed. This futility exception enunciated by the Ninth Circuit Court of Appeals has been based on the dissent found in the *MacDonald, supra* opinion.

Petitioner has relied upon the cases of *Long Grove Country Club Estates, Inc. v. The Village of Long Grove,* 693 F.Supp. 640 (E.D. Ill. 1988); *Shelter Creek Development, supra; Herrington, supra;* and *Hoehne, supra.* Said cases are both factually and legally distinguishable from the matters at hand. In those cases, the Court addressed whether or not futility would excuse the landowner from obtaining a final decision in order to satisfy the ripeness test set forth in *Williamson, supra.* The futility requirement set forth in said cases, has not been met by the instant Petitioner under the facts presented at the trial court level.

In *Hoehne, supra,* the landowners received a final decision when the governmental entity refused to grant a subdivision application; *and* later changed its general plan for land use development, as well as its zoning maps. The

Court held these actions evidenced the city had reached a final decision in the matter. As a result of said actions, the Court held any further attempts by the plaintiff to obtain a subdivision application approval would have been futile. In so holding, the Court stated that it based its decision on the specific facts presented in the case. Relying on *Williamson*, specifically at 473 U.S. at 190-91; 105 S.Ct. at 3118-19; the Court stated:

> This Court has held that the *final decision requirement is applicable to substantive due process and equal protection claims brought to challenge the application of land use regulations, Kinzli v. City of Santa Cruez*, 818 F.2d 1449, 1455-56 (9th Cir.), as amended, 830 F.2d 968 (1987), cert. denied, ____ U.S. ____, 108 S.Ct. 775, 98 L.Ed.2d 861 (1988); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379 (9th Cir.), cert. denied, ____ U.S. ____, 109 S.Ct. 134, 102, L.Ed.2d 106 (1988); *Herrington*, 857 F.2d at 569, and is most likely applicable to related procedural due process claims, *id.*
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> * * *
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> The Supreme Court has recognized that land-use planning is not an all-or nothing proposition. A government entity is not required to permit a landowner to develop property to the full extent it may desire. Denial of intensive development desired by a landowner does not preclude less intensive, but still viable development. (Citation omitted). "The local agencies charged with administering regulations governing property development are singularly flexible institutions; . . . the property owner, therefore, has a high burden of proving that a final decision has been reached by the agency before it may seek compensatory or injunctive relief in federal court on federal constitutional grounds." (Emphasis added).
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> * * *

> . . . only the facts tell us whether a final decision had been reached.

In the case at hand, not only did Petitioner fail to obtain a final decision from the Respondent; Petitioner failed to utilize its state court remedies in an effort to obtain just compensation. Further, said remedies were not inadequate to redress any injury the Petitioner suffered as a result of the alleged "taking" of its property. Finally, condemnation proceedings were instituted by the Respondent in a timely fashion once the parties were unable to resolve the matter amongst themselves; with the Petitioner ultimately receiving over Six Hundred Thousand ($600,000.00) Dollars in "just compensation". If Petitioner felt it did not receive compensation for the property upon which it sought to build the addition, the state remedies provided for in Michigan were sufficiently adequate to return the Petitioner to the status it would have occupied had the "taking" not occurred.

Petitioner did not obtain a final decision from the Respondent; and, any attempts by the Petitioner to obtain a final decision *would not have been futile.* As stated previously herein, Petitioner was late as a result of its own contractor's failure to develop site plans prior to the specified completion date for the addition to the building. Further, Petitioner never satisfied the four other contingencies necessary for final approval of the site plan by the Respondent. No final site plans were ever submitted to the Respondent. M.C.L.A. 125.584(d)(5); M.S.A. 5.2934(4) states:

> "A site plan shall be approved if it contains the information required by the zoning ordinance and is in compliance with the zoning ordinance and the conditions imposed thereunder, other applicable ordinances, and state and federal statutes."

Had the Petitioner satisfied the other four contingencies and submitted revised site plans; by state law, Respondent would have been required to approve the site plans. In turn, entitling Petitioner to a building permit. If Respondent refused, by statute; M.C.L.A. 600.4411; M.S.A. 27A.4411; Petitioner could have compelled same. Yet, Petitioner never submitted any site plans after June, 1979. As late as September, 1979 Petitioner's building contractor was still revising the site plans which had been tentatively approved by the Respondent subject to the five stated contingencies. The Respondent removed the dedication contingency, as a condition to the final approval of Petitioner's site plan, in early October, 1979; when it offered to purchase the 27 feet. A final decision in this matter was not obtained. Unlike the plaintiff in *Hoehne* any attempts by the Petitioner to obtain a final approval of its site plan would not have been futile. There are absolutely no facts to establish the submission of a set of site plans meeting the other four contingencies would have been futile.

Petitioner has failed to satisfy the elements necessary to demonstrate futility. The Michigan Supreme Court correctly applied the *Williamson* opinion and case law interpreting same to the facts at hand. This Honorable Court should not grant the Petitioner's Petition for Writ of Certiorari.

CONCLUSION

In summary, Petitioner failed to satisfy the finality requirement set forth in *Williamson, supra*; when it failed to obtain a final decision from the Respondent *and* failed to utilize its state court remedies to seek just compensation as a result of an alleged taking. Under the facts at hand no taking of the Petitioner's property occurred without just compensation.

The Michigan Supreme Court's decision affirming the Michigan Court of Appeals, based upon the finality holding of the *Williamson* case is *not* clearly erroneous. The case law interpreting the finality requirement for ripeness, before a 42 U.S.C. Section 1983 action can be brought; applies to claims attempting to assert a "taking" under the Fifth and Fourteenth Amendments, a denial of equal protection *and* substantive due process. Thus, it is clear that *Williamson* is clearly applicable to the matters at hand.

Applying the *Williamson* decision and the cases interpreting same set forth herein, the Michigan Supreme Court correctly determined that the Petitioner failed to obtain a final decision from the Respondent herein. Petitioner never received a final decision from the Respondent. Nor did the Petitioner utilize any state court proceedings such as mandamus, injunctive relief or inverse condemnation. The Michigan Supreme Court correctly found that the Petitioner's 42 U.S.C. Section 1983 claim was not ripe for adjudication. Petitioner's futility argument is unsupported by the facts in the instant matter.

RELIEF REQUESTED

Based upon the foregoing the Respondent CITY OF WESTLAND, respectfully prays that this Honorable Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

CUMMINGS, MCCLOREY, DAVIS & ACHO, P.C.
By: OWEN J. CUMMINGS
GAIL P. MASSAD
33900 Schoolcraft Road
Livonia, Michigan 48150-1392
(313) 261-2400
Attorneys for Respondent
CITY OF WESTLAND

Dated: November 13, 1989